A **TOKIO MARINE INSURANS (MALAYSIA) BHD**

v.

WTS ELECTRICAL & ENGINEERING SB & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[SUIT NO: BKI-12B-2/2-2012]
25 MAY 2012

C ***INSURANCE:*** *Motor insurance - Loss or damage to car - Whether respondents took reasonable precautions to prevent loss of vehicles - Factors to consider - Whether evidence adduced to show that respondents' compound subject to theft - Whether respondents had been reckless*

D A comprehensive insurance policy ('policy') was taken out by the respondents ('plaintiffs') with the appellant ('defendant') in respect of two cars owned by the plaintiffs. The coverage of the said insurance included loss by theft. Having discovered the cars missing from their compound, the plaintiffs lodged a claim against the defendant under the policy but the said claim was rejected. A E suit was then filed in the Sessions Court and the court sustained the claim of RM100,000 under the policy. Dissatisfied with the said decision, the defendant appealed to this court. Relying on the terms of the disclaimer in the policy, the defendant submitted that the Sessions Court judge erred in finding that the plaintiffs had F taken reasonable precautions to safeguard the two vehicles from loss and damage. In light of this, the issue that arose for consideration herein was whether the plaintiffs had taken reasonable precautions to prevent the loss of the two vehicles.

G **Held (dismissing appeal with costs):**

(1) Whether the plaintiffs had taken reasonable precautions is a question of fact based on the particular circumstances of each case. It was undisputed that the two vehicles were parked well H within the plaintiffs' compound which was surrounded by fences and an entrance gate which could be locked. (paras 6)

(2) There was little doubt that the basic intention of the comprehensive insurance taken out by the plaintiffs for the I vehicles was to provide coverage for loss of vehicle through theft. There was no evidence from the defendant that the area in which the plaintiffs' compound was situated was an area

well known for theft of vehicles. Neither was there any evidence that the plaintiffs' compound had been subject to theft before. (para 9)

(3) There was no submission by the defendant that the insurance paid by the plaintiffs was higher than those other clients who had taken a similar policy. Without such evidence, the court could reasonably assume that the area in which the plaintiffs' compound was situated was not an area which was subject to regular burglary. The fact that the compound was fenced up with a gate which could be locked also showed that the plaintiffs had not been reckless. Hence, the finding of the learned Sessions Court judge was not repugnant to reason. (paras 9 & 10)

Obiter:

(1) Litigation in this country is premised on an advocacy system which means that the litigants are in control of their respective case and it is their absolute right to decide which witness to call or not to call to support their case. The court's primary duty is to deliberate on evidence tendered by the litigants. It is not the duty of the court to force litigants to supply witness whom it thinks is relevant to the issue in dispute. (para 10)

Case(s) referred to:

Fraser v. BN (Productions) Ltd; Miller, Smith & Partners (Third Party) [1967] 2 Lloyd's LLR 1 ***(refd)***

Hong Leong Assurance Bhd v. Teoh Seow Chiew [2004] 8 CLJ 247 HC ***(refd)***

Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool [2011] 1 CLJ 332 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114

For the appellant - Colin Clark; M/s Clark, KS Chin & Co
For the respondents - Bernard Chia; M/s Jenny Lim Lee & Wong

Reported by Kumitha Abd Majid

A

JUDGMENT

David Wong Dak Wah J:

Proceeding

B **[1]** This is an appeal by the defendant/appellant (defendant) against the decision of the Sessions Court Judge who sustained the claim of RM100,000 of the plaintiffs/respondents (plaintiffs) under an insurance policy issued by the defendant in respect of the theft of two cars belonging to the plaintiffs.

C

Background Facts

[2] The 1st plaintiff and the 2nd plaintiff were respectively the owners of two vehicles with registration number SS5346J and SS5345J. A comprehensive insurance policy was taken out by the D plaintiffs with the defendant in respect of the two vehicles. The coverage of the insurance includes loss by theft. On the evening of 15 October 2007, the two vehicles were parked in the storage area of the plaintiffs' compound. These two vehicles were E discovered to be missing at around 5.30am the next day. As a result of the loss from the theft of the two vehicles, the plaintiffs lodged a claim against the defendant under the comprehensive insurance policy. That claim was rejected by the plaintiffs, the result of which is this suit.

F

Issue

[3] From the submissions of counsel and the grounds of decision of the Sessions Court, it is my view that there is only one issue before this court and it is this:

G

> Whether the Plaintiffs had taken reasonable precautions to prevent the loss of the two vehicles?

[4] The disclaimer of the defendant is premised on one of the terms of the insurance policy (cl. 7) which reads as follows:

H

> You have taken all reasonable precautions to safeguard your vehicle from loss or damage.

I

[5] Learned counsel for the defendant submits that the learned Sessions Court Judge had erred in finding that the plaintiffs had taken reasonable precautions to safeguard the two vehicles from loss and damage. The particulars in which the learned Sessions Court Judge failed to take into consideration are these:

1. The key was left in the two vehicles.
2. The gate to the compound was not closed or locked on that evening of the incident.
3. The inconsistency between the evidence of PW1 (who is the managing director of the plaintiffs) in court to his statement given to DW1 who is the defendant's adjuster.

[6] Whether the plaintiffs had taken reasonable precautions is a question of fact based on the particular circumstances of each case. The learned Sessions Court Judge had found that the plaintiffs had discharged that duty and in coming to his conclusion he found that the evidence of PW1 to be credible after observing his demeanour in court during his testimony. That conclusion of course must not be against the weight of evidence or so unreasonable which no reasonable tribunal would arrive at. To determine that question, I must look at the totality of the evidence which I do now. It is undisputed that the two vehicles were parked well within the compound of the plaintiffs. Within that compound, it contains the residence of PW1 and PW2 (who is the wife of PW1). That compound is surrounded by fences with an entrance gate which can be locked. PW1 as security against theft also had 20 dogs roaming around the compound. The two vehicles are left in the compound after they have been used by the employee of the plaintiffs and it is the practice that keys are left in the vehicles. At this juncture, it would be opportune for me to refer to two cases which give some light what the term 'reasonable precaution' means. Lord Diplock LJ in *Fraser v. BN (Productions) Ltd; Miller, Smith & Partners (Third Party)* [1967] 2 Lloyd's LLR 1, at p. 12, opines as follows:

> "Reasonable" does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is *inter alia* to indemnify the insured against liability for his (the insured's) personal negligence.

[7] Raus Sharif J (as he then was) in *Hong Leong Assurance Bhd v. Teoh Seow Chiew* [2004] 8 CLJ 247, had dealt with the meaning of reasonable precaution and he stated as follows:

> With due respect, I am unable to agree with the Defendant's contention. I am of the view the plaintiff's act of delivering his motorcar to a car-wash operator at the Petronas Petrol Station at Tg Tokong, is not an act of failure to take reasonable precaution, against loss or damage to the motorcar. The plaintiff's act cannot be termed as reckless. There are no elements of the respondent deliberately courting a danger. Thus, I am unable to accept the defendant's contention that the plaintiff in this case has acted recklessly.

[8] From the *dicta* of Raus Sharif J, it appears that for the insured to lose protection against coverage for theft, its conduct must be such that it was reckless or had deliberately courted danger. His Lordship's *dicta* is adopted by the recent Court of Appeal decision in *Naza Motor Trading Sdn Bhd v. Malaysian Motor Insurance Pool* [2011] 1 CLJ 332 where it held as follows:

> [23] From the facts of the case as revealed in the Appeal Records, we find that there is not a single element to show that the plaintiff's salesman was deliberately courting danger. He also cannot be said to have thrown caution to the winds. In the circumstances leading to the situation where the potential buyer of the test-car had driven off with the car, was beyond any reasonable expectations. The poor salesman was deceived into leaving the car with a view to oblige the potential buyer. No reasonable man would have foreseen that such a potential buyer, who had portrayed himself as a man of some standing in society, would have acted in such a manner. The deceit by the potential buyer is indicative of his dishonest intention to take the car out of the possession of the salesman, without the latter's consent. This situation is similar, by analogy, to Illustration (b) of s. 378 of the Penal Code. To our minds, what transpired on that fateful date of 20 November 1998 was a theft *per se* of the Mercedes Benz, by the potential buyer.

[9] There is little doubt that the basic intention of the comprehensive insurance taken out by the plaintiffs for the vehicles was to provide coverage for loss of vehicle through theft. Even assuming that the gate was not locked at that time of incident, can it be said that the plaintiffs were courting with danger or reckless. There is no evidence in court from the defendant that

the area in which the plaintiffs' compound was situated is an area well known for theft of vehicles. Neither is there any evidence that the plaintiffs' compound had been subject to theft before. There is also no submission by the defendant that the insurance paid by the plaintiffs is higher than those other clients who have taken similar policy. Without such evidence, the court can reasonably assume that the area in which the plaintiffs' compound was situated is not an area which is subject to regular burglary.

[10] That being the case, it cannot be said that the plaintiffs' conduct is one courting for danger. The presence of 20 dogs is ample evidence that the plaintiffs had taken steps to prevent theft. The fact that the compound is fenced up with a gate which can be locked also shows that they had not been reckless. In short, the finding of the learned Sessions Court Judge is not repugnant to reason. Finally I am perturbed that the learned Sessions Court Judge had agreed to the oral application to force DW2 (who is a representative of the defendant and happened to be present in court) to testify. Litigation in this country is premised on an advocacy system which means that the litigants are in control of their respective case and that means that it is their absolute right to decide what witness to call or not to call to support their respectively case. It is not the duty of the court to force litigant to supply witness whom it thinks is relevant to the issue in dispute. The court's primary duty is deliberate on evidence tendered by the litigants. If one party fails to call a relevant witness, the court is entitled to invoke s. 114 of the Evidence Act which allows the court to draw adverse inference for that failure. It is fortunate in this case DW2's evidence had no influence on how the case should be decided.

Conclusion

[11] For reasons stated above, I dismiss the appeal with costs in the sum of RM7,000 for here and below.